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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 252

AZTEC FILMS, INC., a corporation,

Petitioner,

vs.

GENERAL CASUALTY COMPANY OF AMERICA, a corporation,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GENE E. GROVE,
210 West Seventh Street,
Los Angeles 14, California,
Attorney for Respondent.

ROBERT E. DUNNE,
Counsel of Record.

The Myer Legal Press, Los Angeles, Phone MA. 5-8020

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IN THE

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OCTOBER TERM, 1960

No. .....

AZTECA FILMS, INC., a corporation,

Petitioner,

vs.

GENERAL CASUALTY COMPANY OF AMERICA, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The Petitioner Has Failed to Establish Grounds Pursuant to the Rules, Evidence, Facts and Law Involved in This Matter for the Issuance of a Review by a Writ of Certiorari in This Court.

The Respondent, General Casualty Company of America, a corporation, hereinafter referred to as "Respondent, General", asserts on the following bases that the Petitioner has failed to make the showing necessary for the issuance of the requested Writ:

I. *The showing of the Petition fails to establish, pursuant to Rule 19 of the Rules of the Supreme Court of the United States, that there exists spe-*

cial and important reasons for the issuance of the Writ.

II. *The showing of the Petition fails to establish that the judgment of the Ninth Circuit Court is in conflict with decisions of other Federal courts of appeal or decisions of the State of California involving important questions in the State of California.*

III. *The showing of the Petition fails to establish that the matters raised in the Petition were not fully and accurately considered by the United States Court of Appeals for the Ninth Circuit.*

IV. *The Petition establishes that the Ninth Circuit considered its disposition of this case so conclusive that it felt it unnecessary to rule or determine with respect to the Respondent General's premise that there was a completed sale in this instance.*

I.

The Showing of the Petition Fails to Establish, Pursuant to Rule 19 of the Rules of the Supreme Court of the United States, That There Exists Special and Important Reasons for the Issuance of the Writ.

A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

Rule 19, Rules of the Supreme Court of the United States.

In the following case, by an equally divided opinion, the Supreme Court had originally granted Certiorari,

Thereafter the Writ was dismissed on the ground that it was improvidently granted. The question involved an asserted constitutional question, which question was resolved by reason of an Iowa Statute. Concerning the philosophy of the Supreme Court with respect to a review by a Writ of Certiorari this Court states:

> "A federal question raised by the petitioner may 'be of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. *Nor does it sit for the benefit of particular litigants.* (*Magnum Import Company v. Coty*, 262 U. S. 159, 163) * * * ". (Emphasis added).
>
> *Rice v. Sioux City Cemetery*, 75 S. C. 614, 349 U. S. 70, 99 L. Ed. 897.

It is the declared policy of this Court not to review by a Writ of Certiorari unless there is a showing that the case involves a question of public importance.

N. L. R. B. v. Pittsburgh Steamship Co. (1951), 340 U. S. 498, 95 L. Ed. 479, 482, 483;

General Talking Pictures Corp. v. Western Electric Co. (1937), 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849;

United States v. Johnson (1925), 268 U. S. 222, 227, 69 L. Ed. 925, 926.

On page 3 of Petitioner's Petition the questions presented are set forth, and on page 8 the Petitioner sets forth the asserted reasons for the granting of the Writ. The Petitioner does not assert or make any showing in the Petition at these places or at any other place with respect to the requirement of the character of importance of the questions and reasons.

The Respondent General submits that without such showing it would be contrary to the declared policy of this Court to issue a Writ in this instance.

II.

The Showing of the Petition Fails to Establish That the Judgment of the Ninth Circuit Court Is in Conflict With Decisions of Other Federal Courts of Appeal or Decisions of the State of California Involving Important Questions in the State of California.

The Petitioner's premise is predicated upon the existence of certain judicial determinations in particular instances wherein it was determined that the word "possession" was ambiguous, and upon the asserted applicability of the rule of ambiguity with respect to insurance contracts. On this basis the Petitioner asserts a conflict in decisions. The Petitioner's major premise, which attempts to predicate the interpretation of a whole contract on the asserted meaning of the naked word "possession", fails if the contract is to be read as a whole, or if the contract and all of the circumstances are to be considered in giving interpretation to the meaning of a phrase or word in the contract.

Obviously, if the latter prevails, the interpretation in the decision of the Ninth Circuit is individualistic to the particular contract and circumstances, and the Petitioner's claim of conflicting state or federal cases fails.

The rule of interpretation of insurance policies in the State of California is set forth in the case of *Baal-*

mann v. Firemens Ins. Co., 168 Cal. App. 2d 287, 335 P. 2d 743. On page 290 this case cites with approval the following wording from the case of *Taylor v. Northwestern National Ins. Co.*, 34 Cal. App. 471, 167 p. 899:

> "At page 473, the court said: 'The construction of a policy of insurance is to be ascertained from the whole instrument, the nature of the property to which the language of the policy is to be applied, the purposes for which property is ordinarily to be used, its situation, and the manner in which it is usually kept (citation . . . .)' * * *".

See also:

Restatement of the Law of Contracts, Vol. 1, Section 235(d), page 319.

The Ninth Circuit Court considered the whole of the contract and found assisting and controlling language for the interpretation within the contract itself. The court in its opinion stated:

> "The clause involved here contains additional language and reads as follows: 'after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured, *except equipment rented to or located for the use of others but not sold*.' (Emphasis supplied). As will appear later the italicized portion of the clause here involved performs an important function in the interpretation of the word 'possession'." (Pp. B-10 and B-11, App. B, Petitioner's Petition.)

The general circumstances of the incident and the nature of the property were considered by the appellate court.

(Pp. B-13 and B-14, App. B, Petitioner's Petition.)

The judgment of the Ninth Circuit Court in this instance having been resolved on the basis of the particular wording of this insurance policy with respect to "possession", and the circumstances of this incident, the Petitioner's premises based upon other California or Federal decisions are not applicable unless it is shown that the wordings of the contract and the circumstances can legally be stated to be the same as the contract and circumstances in this instance.

The cases cited by the Petitioner not only fail to establish the requirement of precedent, but the following cases cited by their express language, support the finding of the Ninth Circuit:

The Petitioner, on page 15 of the Petition, cites the case of *Bennett Chevrolet Co. v. Bankers & Shippers Ins. Co. of N. Y.*, 58 R. I. 16, 18-19, 190 Atl. 863, 864, and quotes therefrom as follows:

> "Its use in any insurance policy, *unaccompanied by explanatory words* to make clear the sense in which it is employed, would seem to be hazardous * * *" (Emphasis added.)

The Ninth Circuit found that the word "possession" in this instance was accompanied by explanatory and interpretive words in the contract itself.

The Petitioner, on page 16 of the Petition, cites the case of *Canadian Radium & Uranium Corp. v. Indem-*

nity Insurance Co., 348 Ill. App. 171, 108 N. E. 2d 515, and quotes therefrom as follows:

> "The term 'possession' used in the policy, in our judgment, means legal possession, *unless the contrary appears from the language in the policy*. * * *" (Emphasis added.)

In this instance the Ninth Circuit Court found in its judgment that the contrary appeared from the language of the policy.

The premise of the Petitioner in seeking the Writ in this matter is predicated upon a claim of a conflict of decisions and upon the interpretation of the naked word "possession", without consideration to the other terms of the contract or the circumstances. Such a premise must fall where the judgment and opinion of the court properly considered all of the terms and conditions of the contract, and all of the circumstances.

III.

The Showing of the Petition Fails to Establish That the Matters Raised in the Petition Were Not Fully and Accurately Considered by the United States Court of Appeals for the Ninth Circuit.

The Respondent General, without belaboring the record, sets forth and asserts that the following cases and propositions in connection therewith were considered and resolved by the Ninth Circuit Court of Appeals and sets forth the Petitioner's cases and the page reference to the Ninth Circuit Court Opinion printed as an Appendix to the Petitioner's Petition:

> *National Safe Deposit Co. v. Stead* (Ill.) 232 U. S. 58, 67; 58 L. Ed. 504, 509; 34 S. C. 209, referred to and considered by the Appellate Court, Appendix B, p. B-8;

Bennett Chevrolet Co. v. Bankers & Shippers of N. Y., 58 R. I. 16, 18-19; 90 Atl. 863, 864, referred to and considered by the Appellate Court, Appendix B, p. B-8;

Canadian Radium & Uranium Corp. v. Indemnity Ins. Co., 348 Ill. App. 171, 108 N. W. 2d 515, referred to and considered by the Appellate Court, Appendix B, pp. B-8 & B-9.

Under its subdivision 1 the Petitioner cites various cases with respect to the rule of interpretation of insurance contracts, including the rules with respect to interpretation where an ambiguity exists. The appellate court thoroughly considered the rules of interpretation, including the rules of interpretation in connection with insurance policies, in reaching its decision.

(App. B, pp. B-12, B-13, B-14, B-15 and B-16. Petitioner's Petition.)

The matters asserted in the Petitioner's Petition were before the Ninth Circuit Court, considered and determined therein.

IV.

The Petition Establishes That the Ninth Circuit Considered Its Disposition of This Case so Conclusive That It Felt It Unnecessary to Rule or Determine With Respect to the Respondent General's Premise That There Was a Completed Sale in This Instance.

The Respondent General asserts that the Petitioner's Statement of the Case is incomplete and in a major particular inaccurate. Because it is unnecessary to do so in this matter, the Respondent General makes no amplification of the statement of facts, and without conceding

the accuracy of the Petitioner's statement takes specific exception to only certain statements needed in connection with this Reply Brief in Opposition to the Issuance of the Writ.

On page 6 Petitioner states:

> "* * *, the trial court found that no sale had been completed and that title to the film still remained in Azteca. The Court of Appeals *accepted as correct* these findings and determination, which accorded with established California decision. * * *" (Emphasis added.)

The above is inaccurate, and the Respondent General refers to the Court of Appeals Opinion, p. B-8 of Appendix B, and quotes therefrom as follows:

> "General in its appeal breaks its argument into four parts. The first three deal with the question of passage of title while the fourth urges that irrespective of whether or not there had been a completed sale Azteca had relinquished possession as contemplated by the endorsement. *If General should be sustained on its fourth contention the question of whether there was a completed sale will become immaterial. We, therefore, examine the fourth contention first.*" (Emphasis added.)

Obviously, the Petitioner's statement with respect to the Respondent General's contentions as to a completed sale, and the Ninth Circuit Court's consideration thereof, are inaccurate.

The fair conclusion to be drawn from the decision of the Ninth Circuit Court and the manner of their consideration of the contention of completed sale is that the contract interpretation basis used by the Appellate

Court was and is so clearly established by law and fact in this instance that consideration of the other contentions were unnecessary.

Conclusion.

The issuance of a Writ in this instance being discretionary and subject to Rule 19 of the Rules of the Supreme Court of the United States, and the established policy of this Court in connection with the issuance of said Writ, the Respondent General respectfully asserts and submits that the Petitioner has failed in its Petition to make the showing required for a review of this matter by such a Writ.

Respectfully submitted,

GENE E. GROFF,

Attorney for Respondent.

ROBERT E. DUNNE,

Counsel of Record.